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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT IN AND FOR THE COUNTY OF MIDDLESEX IN THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

A.

Summary Statement of the Matter Involved.

Your petitioner was indicted on the sixth day of April, 1932, by the Grand Jury for the County of Middlesex in

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the Commonwealth of Massachusetts, of the crime of murder, and held without bail thereon, to which indictment on the same day your petitioner pleaded that he was not guilty; on the twelfth day of April, 1932, the presiding justice of said court appointed A. C. Webber as counsel for your petitioner; on the sixteenth day of May, 1932, the jury in said cause was empaneled, and your petitioner was put to trial for the crime charged in the indictment.

On the seventeenth day of May, 1932, said Commonwealth made a motion for a view by the jury of the scene of the alleged crime. Your petitioner objected to any view by the jury unless he was personally present at said view. Your petitioner also filed a written motion insisting upon his right to be personally present at said view by the jury, and that it was "necessary to acquaint his counsel with facts necessary to his defense." (R. 11.) The court granted the motion of said Commonwealth, denied the right of your petitioner to be personally present at said view, refused to permit your petitioner to be personally present, and denied your petitioner's motion to which your petitioner duly excepted. (Appendix 1, pp. 34-37.) On the same day the jury, accompanied by the presiding justice, the court stenographer and the court officers, and *all counsel* but not accompanied by your petitioner, went to the scene of the alleged crime, where said Commonwealth's counsel pointed out to the presiding justice that in certain respects the scene of the alleged crime was different on the date of the view than it had been on the date of the alleged crime and where said presiding justice stated to the jury that in certain respects the scene of the alleged crime was different on the date of the view than it had been on the date of the alleged crime, all of which was taken down by said court stenographer and was made part of the Transcript of said trial. (Appendix 1, pp. 37-40).

On the twenty-fourth day of May, 1932, the jury returned a verdict of guilty of murder in the first degree, and thereafter your petitioner claimed an appeal, filed his assignment of errors and his bill of exceptions in said cause.

On the sixth day of April, 1933, the Supreme Judicial Court of Massachusetts, the highest court of said Commonwealth in which a decision could be had, by opinion reported in 1933 Massachusetts Advance Sheets, p. 809 (185 N. E. 376), overruled your petitioner's exceptions and affirmed the conviction and has since denied a rehearing of said cause. On the eighteenth day of April, 1933, the Superior Court in and for the County of Middlesex, by a final judgment sentenced your petitioner to the penalty of death by electrocution within the week beginning with Sunday, the eleventh day of June, 1933, and on the fourteenth day of June, 1933, His Excellency, Joseph B. Ely, Governor of said commonwealth, granted reprieve of the execution of said sentence for the period of thirty days.

B.

Reasons Relied on for the Allowance of the Writ.

1. The refusal of the presiding justice to permit your petitioner to be personally present at the view by the jury of the scene of the alleged crime was a denial of the right of your petitioner to face his accusers, meet the witnesses face to face and to be personally present when evidence was offered against him, as prescribed in Part I, Article XII of the Constitution of said Commonwealth and a violation of Article XIV of the Amendments to the Constitution of the United States.

2. The refusal of the presiding justice to permit your petitioner to be personally present at the view by the jury of the scene of the alleged crime, wherein and whereat the presiding justice, accompanied by the jury, the court

stenographer and the court officers, and all counsel took part, controlled and directed proceedings, was a denial of the right of the defendant to be personally present at all stages of the trial and a violation of Article XIV of the Amendments to the Constitution of the United States.

3. The statement by the presiding justice to the jury in the absence of your petitioner that in certain respects the scene of the alleged crime was different on the date of the view than it had been on the date of the alleged crime was a denial of the right of your petitioner to face his accusers, meet the witnesses face to face, and to be personally present when evidence was offered against him as prescribed in Part I, Article XII of the Constitution of said Commonwealth and a violation of Article XIV of the Amendments to the Constitution of the United States.

4. The refusal by the presiding justice to permit your petitioner to be personally present at the view of the scene of the alleged crime and to "acquaint his counsel (appointed by the court) with facts necessary to his defence," to observe changes himself at the scene of the alleged crime from the date of the alleged crime to the date of the view, and to refresh his recollection of the material arrangements, distances and situations of objects at the scene of the alleged crime, was a denial of effective aid in the preparation and trial of your petitioner's case and a violation of Article XIV of the Amendments to the Constitution of the United States.

5. The denial of the presiding justice of your petitioner's right to be personally present at the view of the scene of the alleged crime, in the light of the long established practice in the courts of said Commonwealth, recognized by justices of the highest learning and experience, acknowledging the right under the law of defendants in capital cases to be

personally present at the view of the scene of the alleged crime (with only two exceptions known to counsel for your petitioner, to wit: the instant case and *Commonwealth* v. *Belenski*, 276 Mass. 35, decided on June 5, 1931, presided over by the same trial justice as in the instant case) was a violation of Part I, Article XII of the Constitution of said Commonwealth and a violation of Article XIV of the Amendments to the Constitution of the United States.

6. The precise Federal questions of substance herein raised have not been heretofore determined by this Court.

WHEREFORE your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Superior Court in and for the County of Middlesex (for criminal business) in the Commonwealth of Massachusetts, commanding said court to certify and send to this Court so much of the transcript of the record and of the proceedings of the said Superior Court had in the case numbered and entitled on the docket No. 5891, *Commonwealth* v. *Herman Snyder*, as is necessary to present the constitutional questions and issues herein involved, to the end that this cause may be reviewed and determined by this Court as provided for by Statutes of the United States; and that the judgment herein of said Superior Court be reversed by this Court, and for such further relief as to this Court may seem meet and proper.

Dated at Boston this thirtieth day of June, 1933.

HERMAN SNYDER.

A. C. WEBBER,
HENRY P. FIELDING,
LEO J. HALLORAN,
LEWIS H. WEINSTEIN,
Counsel for Petitioner.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

BOSTON, MASS., *June* 30, 1933.

There personally appeared the above named Herman Snyder and made oath to the truth of the foregoing statements subscribed to by him, before me.

A. C. WEBBER,
Notary Public in and for the Commonwealth of Massachusetts.

My commission expires October 8, 1938.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1933

No. 241

HERMAN SNYDER, PETITIONER,

vs.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Supreme Court of Massachusetts in case against Petitioner is reported in Massachusetts Advance Sheets, (1933) 809, (185 N. E. 376). The writ of certiorari petitioned for is properly directed to the Superior Court in which the record remains and where final judgment was entered.

McDonald v. *Mass.*, 180 U. S. 311 (1901).

II.

Jurisdiction.

The statutory provision sustaining jurisdiction hereof is Judicial Code, Section 237*b* as amended by act of February 13, 1925, 43 Stat. 937 (28 U. S. C. A. sec. 344).

Petition is for review of a cause wherein final judgment has been rendered or passed upon by the highest court of a State in which a decision could be had, in which Petitioner specifically set up and claimed a right under the Constitution of the United States.

III.

Date of Final Judgment.

The date of rescript of the Supreme Judicial Court of Massachusetts is April 6, 1933. The date of sentence to death by electrocution and final judgment of the Superior Court in and for the County of Middlesex is April 19, 1933.

IV.

Statement of Facts.

Petitioner is a citizen of the United States. He was twenty-one years of age at the time of the trial in May, 1932. It is a fair inference from the report on his mental condition, which report is incorporated in the record, that Petitioner is without legal knowledge, not a normal person, or of strong intellect. He is without means. He was indicted, tried, convicted and sentenced to death in the Superior Court for the County of Middlesex of the Commonwealth of Massachusetts, upon an indictment charging Petitioner and two others (Donnellan and Garrick) with the capital crime of murder in the first degree. After arraignment, the court appointed counsel to defend Petitioner. After the trial had begun, and the impanelling of the jury had been completed, the assistant district attorney moved for a view by the jury of the filling station and the locality, the scene of the alleged crime. This filling station was a short distance from the court and within the county and judicial district of the court. It was brought to the attention of the court and at the hearing of the motion

that the assistant district attorney had recently taken a co-defendant (Garrick) who was not to be tried, but was to be used as a Government witness, to the scene and had gone over the case with him there. Petitioner objected to any view by the jury unless he was present and claimed constitutional protection. Petitioner thereupon filed a written motion insisting upon his right, guaranteed by State and Federal constitutions, to be personally present at the view. Petitioner further based his motion—"that it is necessary to acquaint his counsel with facts necessary to his defence." The motion also referred to the taking of Garrick by the assistant district attorney to the scene already alluded to. The court denied that the Petitioner had a right to be personally present at the view, refused to permit the Petitioner to to be personally present at the view, denied his written motion—to all of which Petitioner took an exception. A view was then had by the jury without the personal presence of the Petitioner, and his counsel was obliged to attend without the benefit of such assistance as Petitioner could give if he were personally present. The trial justice was present with the jury at the view, so were the court officers, the court stenographer, and counsel appointed on both sides to attend. At the view the trial justice formally directed and controlled the proceedings. The trial justice at the view stated to the jury agreements of counsel as to facts and changes in the scene that had occurred since the shooting. What occurred at the view was taken down stenographically and appears in the transcript of the evidence as any other part of the trial. In the charge to the jury the trial judge directed without reservation, in accordance with adjudicated cases in Massachusetts, that full use of what was observed by the jury at the view could be used by the jury as evidence in the case upon the issue whether Petitioner had committed the crime of murder in the first degree. Petitioner had been held in custody

without bail since his arrest in April, 1932. The jury were not permitted to separate during the trial until after verdict.

Federal question was specially set up and claimed and brought to the attention of the court at every stage,—orally and by written motion at the time of the view,—in the brief filed on behalf of Petitioner in the Supreme Judicial Court, —and by oral argument in said court. Federal question is discussed in the opinion of the court.

ARGUMENT.

Due Process of Law Required Presence of Petitioner at View.

The judicial act of Mr. Justice Hammond at the trial in the superior court, prohibiting and preventing the Petitioner from being personally present at the view, deprived Petitioner of the protection of the XIV Amendment in that the presence of the defendant was necessary to the fundamental conception of due process of law.

Powell v. *Alabama*, 287 U. S. 45 (1932).

The result reached in *Powell* v. *Alabama, supra,* pointed to the threshold of a door where heretofore only appeared an impenetrable wall. According to that decision, it now may be said that the protection of the due process clause includes within the right of opportunity of being heard, whatever is necessary to assure to the accused, regardless of the merits of the case, all the protection essential to the fundamental conception of a fair and just trial.

No construction of any Massachusetts statute is involved in the case of Petitioner. Massachusetts statutes have never deprived defendants in criminal cases of their right to be present at a view. The only statute relating to view in a criminal case was passed in 1836, in the simplest language—

"The court may order a view by a jury impanelled to try a criminal case."

Rev. Stat. 1836, Chap. 137, Sec. 10.

See also Sec. 9 (Sec. 10 is now General Laws, Ter. Ed. Chap. 234, Sec. 35 and Sec. 9 is Chap. 278, Sec. 6).

For that reason the cases of *Hurtado* v. *California,* 110 U. S. 516, and *Maxwell* v. *Dow,* 176 U. S. 581, and *Holden* v. *Hardy,* 160 U. S. 366, and *Twining* v. *New Jersey,* 211 U. S. 78, 111 and cases there collected, do not apply.

It is not conceded, however, that limitations do not exist upon the legislative power of the States under the XIV Amendment.

See remark of Mr. Justice Moody in *Twining* v. *New Jersey, supra,* at p. 99.

It has been held that while leaning towards an agreement with the views of the State courts, the Supreme Court of the United States exercises an independent judgment in dealing with principles of general law.

Truax v, *Corrigan,* 257 U. S. 312, 324 (1921).

See *B. & O. R. Co.* v. *Baugh,* 149 U. S. 368, 370 (1893).

Decision of State courts "are, at most only evidence of what laws are, and not of themselves law."

See *B. & O. R. Co.* v. *Baugh, supra.*

Thus, the law of Massachusetts upon the question of the right of a defendant to be present at a view in a capital case is open for argument so far as this case is concerned.

Ordinarily, to determine fundamental rights essential to the conception of a fair and just trial in a capital case, recourse is had to the history and origin of our law, "its usages and modes of proceeding." Here, such research is of little value since a view in capital cases was comparatively rare at common law because "it would seem to vio-

late an important principle, that all the proceedings should be in the presence of the accused."

Parker, C. J. in *Com.* v. *Parker,* 2 Pick., 550, 551 (1824).

If granted at all, views were had on the motion of and with the consent of the accused. Even then, doubts were expressed whether in a capital case the accused could be held to his consent.

Com. v. *Knapp,* 9 Pick. 496, 515, 516 (1830).

See *Com.* v. *Handren,* 261 Mass. 294, 297 (1928).

Early statutes in Massachusetts provided for views "in all causes relating to the realty" and later "in all causes relating to real estate."

Mass. Statute, 1784, 7.

Mass. Statute, 1807, 140, section 8.

The language in these early statutes "that either party may have a jury to view the place in question if the court shall be of the opinion that such view is necessary to a just decision", is the language since adopted in most State jurisdictions where view is regulated by statute.

The enabling statute in Massachusetts was passed in 1836 in the simplest language—"The court may order a view by a jury impanelled to try a criminal case" and that, to this day, is all that our Legislature has ever said upon the question of a view in a criminal case. It may be strongly argued that Legislature intentionally refrained from interfering with the fundamental structure of jury trial.

See Rev. Stat. of Mass. (1836) Chap. 137, Sec. 10.

See also Sec. 9, now General Laws, Chap. 234, Sec. 35.

It was by virtue of the above statute that Chief Justice Shaw ruled that authority existed to permit a view in a capital case.

Com. v. *Webster,* 5 Cush, 294, 298, 299 (1850).

Com. v. *Chance,* 174 Mass. 245, 247 (1899).

From 1830 until 1922 counsel have been unable to find any reported decision of the Massachusetts Supreme Court dealing with or doubting the right of the accused to be personally present at a view in a criminal case. In 1922, the matter arose in a case where the presiding judge in the trial court, following the usual practice, recognized the right of the accused to be personally present at a view to exist, and where counsel for the accused in open court waived the right of his counsel to be present at the view.

Commonwealth v. *Dascalakis*, 246 Mass. 12, 29-32.

It is not essential to petitioner's case to dispute the proposition that constitutional rights of a personal nature may be waived and are waived if not seasonably asserted, because Petitioner's right to be present at the view was insisted upon and not waived.

Lebowich, Petitioner v. *Commonwealth*, 235 Mass. 357 (1920).

Commonwealth v. *Dascalakis*, 246 Mass. 12.

To throw light upon the law of Massachusetts up to the point of the Dascalakis case in 1922, in Petitioner's brief before the Supreme Judicial Court, counsel collected from many manuscripts since modern stenographer has come into trial procedure, and set forth proceedings on view in 17 capital cases which occurred from 1892 to 1922. These trials include the celebrated Lizzie Borden case and the Sacco-Vanzetti trial. Five other capital cases from 1925 to 1930 since the Dascalakis opinion were also included. No case was found by counsel of a practice to the contrary. The discussions at these trials were all reported stenographically in full and are set out at length in the brief which is on file as part of petition for certiorari. Language of the most distinguished jurists of Massachusetts appears. The right of the accused to be personally present at a view

in a capital case existed as an unbroken practice and now exists as a matter of law, and the formal waiver by the accused required by the courts was a clear acknowledgment of its necessity under the common law of Massachusetts.

Seventeen of these cases are reported decisions in Massachusetts Reports. The only reference to a view in any of these decisions earlier than the Dascalakis decision is in *Commonwealth* v. *Chance,* 174 Mass. 245, 247 (1899) where it was held that the matter of a view in a criminal case was discretionary and there was no error in denying the request of a defendant for a view. Chief Justice Holmes in the opinion remarks, "the view might have been evidence if it had been taken." It is fortunate that the discussion in the trial court in this case was secured by counsel and is set forth in detail among other cases in brief submitted to Massachusetts Supreme Court by Petitioner (pp. 35-36).

See pages 30-46 of brief of Petitioner in Massachusetts Supreme Court.

The striking feature of this array of fact is that the practice of recognizing the right of personal presence has continued notwithstanding the intimation, by way of *obiter dictum* in the Dascalakis case, that a view is not part of the trial, and that the personal presence of the defendant is a matter of judicial discretion and not of right.

See *Com.* v. *Dascalakis,* 246 Mass. 12 at 30.

With the greatest respect and deference for statements of our Chief Justice, the trial occurrences quoted from in former brief are contrasted with the expression in the Dascalakis case: "but the actual practice as disclosed by highly important capital trials has been that the whole subject has been treated as a function of the court," and against the assistance purely negative sought from the cases of *Commonwealth* v. *Knapp* and *Commonwealth* v. *Webster.*

Then in 1931, in the trial of Joseph Belenski, for the first time in the judicial history of Massachusetts, so far as counsel have been able to ascertain, the precise question of the instant case was raised by the refusal of the trial court to permit an accused in a capital case to be personally present at the view. That case was presided over by Mr. Justice Hammond, who a year later was to preside over the trial of petitioner. The Supreme Court of Massachusetts upon the sole authority of *Commonwealth* v. *Dascalakis,* without any discussion of the point, said there was no error.

Com. v. *Belenski,* 276 Mass. 36 (1931).

Petitioner's counsel claim that these two instances, that of Belenski and that of Snyder, Petitioner, are unique in that they are without parallel in the judicial history of the entire nation. It is thus manifest that this case does not present a situation where the construction of a state statute by a state court is to be reviewed, nor where numerous decisions of long standing of a state court have established a rule contrary to the position taken on behalf of Petitioner. (See p. 11 *supra.*)

Appendix A is an analysis of decisions and authorities dealing with the right of a defendant to be present at a view.

Appendix B is an analysis of the question whether a view is the taking of evidence and shows that upon reason as well as abundant authority, and particularly in Massachusetts, a view is the taking of evidence.

Appendix C is an analysis of cases apparently *contra* to the result herein sought, distinguishing and differentiating cases of waiver, etc., from the instant case.

In case of Petitioner, positive directions of the trial court to the jury were to the effect that the view constituted the taking of evidence and that the view was evidence upon

which the jury might convict Petitioner. (Appendix 1, p. 41.)

Moreover, the view was a proceeding conducted and directed by the trial judge himself. Whether in or out of the courtroom, it was within the trial jurisdiction of the court. Petitioner's claim is that his own presence at the view was necessary to afford him a fair and just hearing and a full and adequate opportunity for defense, necessary for due process, within the meaning of the Fourteenth Amendment. Furthermore, and wholly independent of the right of the state court to declare the law, due process in a capital case entitles an accused to a jury trial as that institution existed at common law.

Within the formula of "a hearing", evidence at a jury trial in a capital case must be offered in the presence of the accused. This is an assurance to the accused by the Massachusetts Constitution, Bill of Rights, Article XII—

> "And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to being fully heard in his defense by himself, or his counsel, at his election * * *".
>
> See also Sixth Amendment to the Constitution of the United States.

There is also the Massachusetts Statute (General Laws, Chapter 276, section 6) which further directs that "A person indicted for a felony *shall not* be tried unless he is personally present during the trial." None of these safeguards have yet been touched in Massachusetts by act of Legislature.

A most fundamental requirement of a fair and just trial at common law and under constitutional and statutory provisions is the necessity of the personal presence of an accused in a capital case at every stage of the trial. And

under the decision of *Powell* v. *Alabama*, 287 U. S. 45 (1932) the protection of the due process clause of the Fourteenth Amendment includes this fundamental right within the right of a fair opportunity of being heard.

This Court in *Lewis* v. *United States*, 146 U. S. 370, 372 (1892) stated:

> "A leading principle that pervades the entire law of criminal proceedings is, that after indictment found, nothing shall be done in the absence of the prisoner."

And in *Hopt* v. *Utah*, 110 U. S. 574, 578, 579 (1884) this Court stated:

> "His (the prisoner's) life or liberty may depend upon the aid which, by his personal presence, he may give to counsel and the court and triers. The necessity of the defense may not be met by the presence of his counsel only."

In *Schwab* v. *Bergren*, 143 U. S. 444, 448 (1892) this Court stated:

> "The personal presence of the accused, from the beginning to the end of a trial for felony, involving life or liberty, as well as the time final judgment is rendered against him, may be and must be assumed to be, vital to the proper conduct of his defense, and cannot be dispensed with."

See *Dowell* v. *United States*, 221 U. S. 325 (1911).

The fundamental right to be present at every stage of the trial in a capital case had its roots in the early history of the common law.

See *Rex* v. *Ladsingham*, Sir T. Raymond Reports, 193 (1682).

In I, Cooley, *Constitutional Limitations* (8th ed.) (1927) p. 667, the author states:

"In cases of felony, when the prisoner's life or liberty is in peril, he has the right to be present, and must be present, during the whole of the trial, and until the final judgment."

See I, Bishop, *New Crim. Proc.* (2d ed.) (1913) sec. 273.

In *French* v. *State*, 85 Wis. 400, 411 (1893), the Court said:

"These great common law requirements have been made constitutional provisions in the various states, and so made essential and paramount, and also indispensable in trials for capital offenses and felonies. It is not too strict to hold that in all such cases the accused must be present in court to meet the witnesses face to face * * * These are great constitutional safeguards against oppression and injustice that must not be abridged or compromised."

See also *Maurer* v. *People*, 43 N. Y. 1 (1870).

The proceedings on the view in this case do not relate to matters merely procedural but to matters fundamental in their nature.

Com. v. *Harris*, 231 Mass. 584 (1919).
Lebowich, Petitioner v. *Com.*, 235 Mass. 357 (1920).

The serious handicap of a prisoner charged with a capital offense in the conduct of his defense and in assisting counsel by reason of the custody and restraining incident to a capital case has been judicially taken notice of in a leading case.

See *Diaz* v. *United States*, 223 U. S. 442, 455.

Proceedings at the view conducted by the judge in this case in the absence of the defendant constituted an inseparable part of the trial by jury at which the Petitioner was entitled under fundamental law to be present, and the denial of his right to be present constituted an invasion of

a more substantial right even than the right to assistance of counsel within the principle of *Powell* v. *Alabama, supra.*

Denial of Effective Assistance of Counsel.

In *Powell* v. *Alabama,* at page 71, the court points out that the duty incumbent upon the trial court to supply counsel in a capital case "is not discharged by an assignment at such time or *under such circumstances* as to preclude the giving of effective aid in the preparation and trial of the case."

Petitioner was in custody, without bail. Counsel presented a motion in writing to the trial court asserting the right of Petitioner to be personally present with the jury at the view and that his personal presence was necessary "to acquaint his counsel with facts necessary to his defence."

The time for Petitioner to act in order to preserve his rights was when the prosecution made its motion for a view of the scene. Unless Petitioner then insisted upon being personally present, this important right would have been waived for all purposes and for the entire trial. A matter of strict right would then have become wholly a matter of judicial discretion. It would have been imprudent for Petitioner to speculate upon the mere hope that the discretion of the trial court might at some time later be exercised in his favor. The colloquy between the Court and counsel for the co-defendant, Donnellan, on this point, referred to in the opinion of the Supreme Judicial Court of Massachusetts, does not set forth what immediately followed when counsel for Petitioner clearly made it understood that he objected to any view unless his client was personally present when effective aid to Petitioner's counsel at the scene was most necessary. (Appendix 1, pp. 33-41.) Moreover, the time for most effective assistance by Petitioner's personal presence was at the outset of the trial when the jury had first impressions and possible errors and miscon-

ceptions created in their minds against Petitioner by the evidence which was presented to the jury and the trial court at the scene.

As set forth in this petition (sub-heading B, paragraph 4) the facts bring the case of Petitioner clearly within the language and principles of *Powell* v. *Alabama*, *supra*.

Denial of Equal Protection of the Laws.

The Due Process Clause and the Equal Protection of the Laws Clause of the Fourteenth Amendment are not co-extensive or conterminous in their spheres of protection.

Truax v. *Corrigan*, 257 U. S. 312, 331-332 (1921).

Petitioner was denied equal protection of the laws. Charged with a capital offense he was in custody without bail. He had no control over his presence or absence. Constraint under such circumstances is naturally more strict than in the usual felony case. The serious handicap of an accused under such circumstances in the conduct of his defence and assisting counsel has been judicially noticed by this Court.

See *Diaz* v. *U. S.* 223 U. S. 442, 445 (1912).
Hopt v. *Utah*, 110 U. S. 574, 578, 579 (1884).
Lewis v. *U. S.*, 146 U. S. 370, 374 (1892).

To hold that a prisoner held in custody without bail shall be denied the right to be personally present at a view, while a defendant who is on bail or admitted to bail is free to accompany the jury at the view, would be to deny defendants in capital cases the equal protection of the laws.

See *Powell* v. *Alabama*, *supra*.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory

powers in order that rights under the Constitution of the United States be preserved, and that to such an end a writ of certiorari should be granted, and this Court should review the judgment of the Superior Court of Massachusetts and finally reverse it.

Respectfully submitted,

A. C. WEBBER,
H. P. FIELDING,
L. H. WEINSTEIN,
L. J. HALLORAN,
W. J. MCCARTY,
Attorneys for Petitioner.

APPENDIX A.

Is a view by the jury in a capital case of the scene of the alleged crime, a stage of the trial at which the accused has the right to be personally present if he seasonably insists upon it?

Authority and reason seem forcibly to point in that direction.

Arkansas: *Whitley* v. *State*, 114 Ark. 243, 255 (1914)
"This was a right the defendant had."
Benton v. *State*, 30 Ark. 328, 350 (1875)

Arizona: *Elias* v. *Territory*, 9 Ariz. 1, 11, 15 (1904)
View had on motion of defendant who did not express desire to be present. Neither counsel attended view.

California: *People* v. *White*, 20 Cal. App., 156, 159 (1912)
"And the right of the defendant to be present if he demands it cannot be denied him, without committing a serious irregularity."
People v. *Bush*, 68 Cal. 623 (1886)
People v. *Lowrey*, 70 Cal. 193 (1886)

Florida: *Guardia* v. *State*, 34 Fla. 311, 334 (1894)
"The safest course is to have the defendant present, *Thompson Trials*, ss 886, 887."

Georgia: *Chance* v. *State*, 156 Ga. 428, 433 (1923)
"It was the right of the defendant to be present when the automobile was inspected, in order to make suggestions by himself or through his counsel with respect thereto that he might deem necessary or proper for his defence, and being deprived of this important right * * * a new trial should be granted."

Idaho: *State* v. *McGinnis*, 12 Idaho, 336, 343, 344 (1906)
"We have no doubt of the right of a defendant to be present at such an ex-

amination and inspection in any and every case where he request that privilege."

Indiana: *Barber* v. *State,* 199 Ind. 146 (1927)
Conrad v. *State,* 144 Ind. 290, 298, 299 (1895)
Shuler v. *State,* 105 Ind. 289 (1885) (State statute protects rights of defendants by requiring consent to a view.)

Kentucky: *Freeman* v. *Com.,* 226 Ky. 850, 851 (1928) "Viewing the premises is the receiving of evidence, and that it is error to allow the jury to view the premises in the absence of the accused * * * judgment of conviction must be reversed."
Carney v. *Com.* 181 Ky. 443 (1918)
Riddle v. *Com.,* 216 Ky. 220 (1926)

Louisiana: *Bertin* v. *State,* 24 La. Ann. 46 (1872)

Maine: *State* v. *Slorah,* 118 Me. 203, 215 (1919) "Whatever his rights are to attend, if he demands it, *and we think it should not be denied him in a capital case,* he may in all cases waive them, and the view properly proceed in his absence."

Michigan: *People v. Auerbach,* 176 Mich. 23, 47 (1913) " * * * the respondent had the right to accompany the jury to the view had he desired to do so in this case." (Deft. on bail)
People v. *Hull,* 86 Mich. 449

Massachusetts: (See reports of capital cases set out in brief filed in Massachusetts Supreme Court in this case.)

Mississippi: *Foster* v. *State,* 70 Miss. 755; 765 (1893) (very effective discussion that view is receiving of evidence)

Montana: *State* v. *Landry,* 29 Mont., 218, 226 (1903)

Nebraska: *Carroll* v. *State*, 5 Neb. 31, 35 (1876)
Neal v. *State*, 32 Neb. 120 (1891)
Nevada: *State* v. *Hartley*, 22 Neb. 342 (1895)
N. Hampshire: *State* v. *Buzzell*, 59 N. H. 65.
New York: *People* v. *Palmer*, 43 Hun. 397, 401, 402 (1887)
(very effective discussion that view is evidence)
See dissenting opinion in *People* v. *Thorn*, 156 N. Y. 286, 300 (1898)
Ohio: *Coletti* v. *State*, 12 Ohio App. 104, 106 (1919)
See *Blythe* v. *State*, 47 Ohio St. 234 (1890)
Oklahoma: *Hays* v. *Territory*, 7 Okla. 15, 22 (1898)
"In the absence of statutory provision, there is but little doubt but that the defendant should accompany the jury when sent out to view places or objects, unless he expressly waives that right; * * *"
Starr v. *State*, 5 Okla. Crim. Rep., 440, 467 (1911)
"In making such request (for view), the defendant thereby expressly waives the right of being present at the view. Where the view is had on the request of the prosecution or the court on its own motion directs a view, the safe practice is to permit the defendant to accompany the jury and be present unless he expressly waives the right." (Case contains long discussion and review of authorities.)
Virginia: *Noell* v. *Com.* 135 Va. 600, 606, 621 (1923)
"* * * the authorities are practically uniform in holding that the accused always has the right to attend a view if he does not expressly or by implication waive it, and that it is error to deny him that privilege."

Washington: *State* v. *Hilsinger,* 167 Wash. 427, 437 (1932)

West Virginia: *State* v. *McCausland,* 82 W. Va. 525, 528, 530 (1918)

"There can be no difference in the proffer of objects to the jury in the courtroom and such exhibition by taking the jury to view such objects, when they are not susceptible of being brought into court * * * Under our decisions, the right of the accused in a felony case to be present at every stage of the trial is one he cannot waive * * *"

Wisconsin: *Sasse* v. *State,* 68 Wis. 530 (1887)

"We may say further, in respect to the view in this case, on the trial of a defendant for a capital offense, that we think it very questionable whether it should have been taken in his absence, unless he expressly waived his right to be present."

Textbooks and writers all support the principle that presence of defendant is necessary, unless waived.

I Thompson on Trials, sec. 886, 887.

Franklin Fiske Heard, Report on Trial of Leavitt Alley (Little, Brown & Co., Boston, 1875). Title "View." "View must be made in presence of accused."

12 Harvard Law Review, 211 (1898), Title *"Is a View by Jury Part of the Trial"* (an excellent criticism of statements of court in *People* v. *Thorn,* 156 N. Y. 286 (1898), that view is not evidence).

Wharton's Crim. Law, 9th Ed., Vol. 3, sec. 707 (quoted from in dissenting opinion of Mr. Justice Clarke, in *Valdez* v. *United States,* 244 U. S. 432, 453 (1917).

Encyc. Pl. & Pr., Vol. 22, p. 1059 (also quoted from in opinion of Mr. Justice Clarke).

1 Zoline Crim. Law & Proc., p. 254 (contains following: "It is to be hoped that *nisi prius* judges, out of an abundance of precaution because of regard for the rights of the accused, will never undertake the inspection of premises without the personal presence of the accused.")

II Bishop, Crim. Proc. (2d Ed.) (1913), sec. 965, 3, *View Contra.*

3 Wigmore Ev. (2d Ed.) (1923), s. 1803.

APPENDIX B.

Does the view by the jury in a capital case relate to mere method of procedure or is it a fundamental feature of a jury trial? An answer to this inquiry requires a determination of what use knowledge acquired by a jury on a view is to be put to upon the issue of guilt or innocence.

The general rule is to the effect that knowledge obtained by a jury at a view is to be considered as evidence in the case and to be given due weight in reaching a conclusion.

> "Any other rule is incapable of practical application."
>
> *Wall* v. *U. S. Mining Co.* 232 Fed. 613, 616 (1905).

> "The view of the place was itself evidence."
>
> *People* v. *Palmer,* 43 Hun. (N. Y.) 397, 401 (1887).

> "To say the jury cannot receive evidence by simply viewing the scene is to insult common sense. The most convincing evidence is made by the sense of sight."
>
> *Foster* v. *State,* 70 Miss. 755, 766 (1893).

Whatever may be held elsewhere, in Massachusetts there seems to be no doubt but that knowledge ascertained by a jury in either civil or criminal cases is evidence.

Tully v. *Fitchburg RR.,* 134 Mass. 499, 503 (1883).

Hanks v. *B. & A. RR.,* 147 Mass. 495, 499 (1888).

> "What they see is evidence in the case."
>
> Oliver Wendell Holmes, J., in *Smith* v. *Morse,* 148 Mass. 407, 410 (1889).
>
> See remark of Holmes, C. J., to same effect in *Com.* v. *Chance,* 174 Mass. 245, 247 (1899) (a capital case.)

In a capital case, it was also held

"There was no error in the statement of the judge as to the right of the jury to consider as evidence what was seen by them on the view."

Commonwealth v. *Mercier,* 257 Mass. 353, 365 (1926).

Commonwealth v. *Mara,* 257 Mass. 198, 209 (1926).

Commonwealth v. *Handren,* 261 Mass. 294, 297 (1927).

"The things thus seen by jurors could not well be banished from their minds. A view often dispenses with the necessity of detailed description by plan or word of mouth. Inevitably that which the jury see on a view will be utilized in reaching a verdict. In that sense that which is disclosed on a view is evidence * * * In another more strict and narrow sense, a view may be thought not to be evidence. Plainly it is not testimony. It is not given by witnesses. It is not offered in the presence of the judge presiding at the trial." Rugg, C. J.

Commonwealth v. *Dascalakis,* 246 Mass. 12, 29 (1923).

Whatever questions may be raised in an academic discussion of the subject, none of these questions are pertinent in the instant case. The judge was actually present at the view and officiated as judge and not as a by-stander. He formally controlled and directed proceedings, made statements of facts and agreements of counsel which were taken down stenographically as part of the trial. In the charge, the jury were given the full use of the knowledge they acquire at the view to the same extent as other evidence in the case. There were no qualifications or reservations whatsoever as to the use of knowledge acquired at the view.

APPENDIX C.

There are judicial expressions in some cases that a view by a jury is not the taking of evidence nor a part of the trial.

People v. *Thorn*, 156 N. Y., 286 (1898).
State v. *Slorah*, 118 Me. 203 (1919).
State v. *Mortensen*, 26 Utah, 312 (1903).
State v. *Ah Lee*, 8 Oregon, 214 (1880).
Com. v. *Dascalakis*, 246 Mass. 12, 28-31 (1923).
Valdez v. *U. S.*, 244 U. S. 432 (1916).
Com. v. *Belenski*, 276 Mass. 35 (1931).

In each case the point was raised for the first time after verdict and the defendant either expressly waived the right to be personally present or made no request to be permitted to go.

In some instances the view was taken at the request of and for the benefit of the defendant.

The *Valdez case* was a trial before a single justice without jury, so that the fundamental question connected with jury trial was not directly involved. In that case there was no request made by or for the defendant to be personally present, and this court added "and we think practically that Valdez's presence was waived." The Chief Justice, and Mr. Justice Clarke dissented. Mr. Justice Clarke, in the dissenting opinion stressed the application of the principle of *Diaz* v. *United States*, 223 U. S. 442, 455. (See also *Hopt* v. *Utah*, 110 U. S., 574, 578, 579; *Lewis* v. *United States*, 146 U. S. 370, 374.)

In *State* v. *Slorah*, 118 Maine 203 (1919) the defendant was permitted to be personally present at the view. Just as the jury was about to enter the house, the defendant created a scene, crying out in the present of the jury, "My God! take me away from here or I shall be insane again." His counsel suggested to the officer in charge of the jury that the defendant be taken into a nearby house which was done, and the jury proceeded with the view in the absence of the prisoner but in the presence of his counsel. The issue here was disposed of on the ground of waiver. The

case as a whole is of assistance to Petitioner in that the court observes that the Massachusetts courts have gone beyond other tribunals in holding a view to be the taking of evidence, and also because of the significant statement on page 215.

> "Whatever his rights are to attend, if he demands it, and we think it should not be denied him in a capital case, he may in all cases waive them and the view properly proceed in his absence."

The decision in *State* v. *Ah Lee*, 8 Ore. 214 (1880), went off on the ground of waiver. It appears that when the motion was made for the view by the district attorney, counsel for the accused stated that they were about to make the same motion. There was no request for the defendant to be present. The court said (page 217):

> "The appellant, if he desired to be present at the view, should have then made an application for that purpose. *If he had desired to see the place where the homicide took place, in order to be better prepared to make his defense, doubtless the court would have permitted him to have accompanied the jury in the custody of an officer*, but failing to make known any desire to be present, he must be deemed to have waived any privilege which he had in this respect."

In *State* v. *Mortensen*, 26 Utah 312 (1903), the issue decided also involved waiver, since the prisoner was not refused an opportunity to be present. The general principal of the existence of the right to be present where seasonably claimed, seems to be recognized by the statement of the court (p. 340).

> "* * * *although we doubt not that in every such case the prisoner should be afforded, as he was in this instance, an opportunity to be present at the view, if such be his desire.*"

The court states that under a construction of the statutes of Utah the view is not a taking of evidence because the

judge was not required to be present and that nothing can be a part of the trial that takes place outside the court.

The court, somewhat illogically, also compares the presence of a defendant at a view with that of presence at the jury's deliberation at the conclusion of the case.

The case most strongly relied upon is *People* v. *Thorn*, 156 N. Y. 286 (1898), *supra*, which regards a view as an inspection merely "to enable the jurors to more accurately understand and more fully appreciate the testimony of witnesses given before them" (p. 298).

> "If, as is contended, the view of the premises by the jurors is a part of the trial *or is the taking of testimony upon the trial*, it may be that the view could not take place in the absence of the defendant; but we are not prepared to concede that the view is a part of the trial or is the taking of evidence" (p. 296).

From an examination of both the majority opinion and the single point discussed in the dissenting opinion, it would seem quite evident that the majority intended principally to lay a basis for its final conclusions that the right was one that could be waived and for no other purpose.

The court, however, deemed it necessary to add, on page 299:

> "If the defendant and his counsel and the district attorney wish to accompany the jury, we think it but reasonable that they should be permitted to do so."

The language and reasoning of the majority opinion that a view is not evidence has been criticized in an excellent note in 12 Harvard Law Review 211 (1898).

Furthermore, carrying the no courtroom, no trial, and therefore no prejudice theory, advanced in the Thorn case, to its logical conclusion would permit actual prejudice of a fundamental character resulting in a conviction to be brushed aside because of a technicality over which the defendant can have no control or direction. That reasoning entirely subordinates to the outward habiliments of a trial the essential human element which is the directing force

and which produces the intended result. It may be that this distinction is wholly due to a strict interpretation of a New York statute minutely regulating sessions of court.

The discussions in both the *Thorn case, supra,* and in *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 28-31, emphasize the absence of the trial judge, and state that his presence and participation at a proceeding are essential to make it part of a trial.

All the above-cited cases (except, perhaps, *Commonwealth* v. *Dascalakis, supra*) are predicated upon the theory that the use of knowledge acquired at the view is not evidence in the case.

No case, however, can be found, other than the recent case of *Commonwealth* v. *Belenski,* 276 Mass. 35 (1931), in which the same trial judge as in the instant case, refused to permit a similar request of accused in a capital case to attend a view. There the Supreme Judicial Court of Massachusetts overruled the exception wholly upon the prior decision of that court in *Commonwealth* v. *Dascalakis.* In the *Belenski case* the point of the presence and conduct of the trial judge at the view was not called specifically to the attention of the court, or argued—beyond a mere statement of the claim—nor was the point discussed on the basis of either general or constitutional law.

Actualities in the instant case render these judicial expressions inapplicable to Petitioner because

1. *Judge was present and officiating.*
2. *Jury were directed to use view as evidence to convict.*
3. *There was no waiver by Petitioner or his counsel.*

APPENDIX 1 TO PETITION.

Stenographic Report of Trial.

I, A. C. Webber, counsel appointed by the court to represent defendant Herman Snyder, do hereby certify that the within pages of the "Transcript of the Evidence" (See Mass. St. 1926, Chapter 329), certified to by Frederick C. Bean, Assistant Clerk of the Superior Court of Middlesex County, is the only part of said Transcript material to the matter of view; and that a copy thereof will be served upon the Attorney General of the Commonwealth of Massachusetts, representing the respondent, together with copies of the Brief.

A. C. WEBBER,
Counsel Appointed by Court for Herman Snyder.

Subscribed and sworn to, before me.

WILLIAM J. MCCARTY,
Notary Public. (Seal.)

Dated at Boston, Mass., August 2, 1933.

Mr. VOLPE: I think it would be of considerable assistance to the jury if we took a view at this time.

The site of this murder is not very far away and I doubt if it will take us more than half an hour.

I would like to make a simple opening to the jury at this time and reserve the right to make a formal opening on their return.

The COURT: Counsel step to the bench.

(Bench conference, at which the following occurred:)

The COURT: Do you want to make any remarks, either of you, before the view is taken? If you do, let me know.

Mr. WEBBER: The District Attorney's opening will do for all of us.

The COURT: If there is anything you want pointed out?

Mr. WEBBER: I will do it there.

The COURT: You will have the opportunity if you want to.

Preliminary Opening on Behalf of the Commonwealth for the purpose of a View, by Frank G. Volpe, Esq., Assistant District Attorney.

May it please your Honor, Mr. Foreman and gentlemen of the jury: You are probably aware at this time that we are going to consider a murder case, and in order that you may understand the evidence as it goes in we are going to take you down here on the Northern Artery, on Somerville Avenue, where this murder took place on April 9, 1931.

There you will see a gasoline station operated by the Cities Service Refining Company. The building sets back from the avenue, with the usual entrances in and out, and certain points will be pointed out to you, for instance, the entrance and the window as you go in, and the tanks, the location of the different articles in that particular station.

From there we are going to take you a short distance over the bridge—perhaps you are familiar with the Northern Artery—and will call your attention to that bridge that you go over, and down where the red and green lights are, and a little beyond, on the left-hand side, two side streets will be called to your attention.

Then you will be brought back here and at that time I will have an opportunity to make a more formal opening and give you the facts and details that the Government expects to prove in this case.

The COURT: Anything that you care to comment on, gentlemen?

Mr. MCDONNELL: Nothing, your Honor.

The COURT: If the officers will make the proper arrangements.

Mr. MCDONNELL: On behalf of the defendant Donnellon, I have not had the opportunity to view the situation.

The COURT: I will appoint you to go on the view as representing Mr. Donnellon, and Mr. Webber likewise.

Mr. MCDONNELL: I am going to request that Donnellon be permitted to view the scene with the jurors.

The COURT: Motions of that sort should be made in writing and in the absence of the jury. Please remember the rule.

The jury may go to the jury room. Wait till the officers qualify.

(Six jury officers were sworn for the purpose of a view.)

The COURT: Do you want to present the written motion?

Mr. McDONNELL: As I understand, as a matter of right the defendant goes and, in order not to go, must waive that right.

The COURT: No, that is not the rule.

Mr. WEBBER: I wish to make a similar request. I object to any view unless my client is present.

The COURT: That has been passed on by the Supreme Court. If you have any motion that you care to rely on that motion should be in writing.

Mr. WEBBER: I will make that motion and raise a Federal question. Under the Constitution of the United States and under our State Constitution no evidence can be offered against anybody in a capital crime, in his absence.

The COURT: That has been passed upon.

Mr. WEBBER: Then I wish to see the client's rights preserved.

The COURT: If you think that is obligatory upon your part as counsel to file that motion, proceed to file it. I can refer you to several cases if you care to have them.

Mr. WEBBER: I will make this motion.

Mr. McDONNELL: The only reason that this is raised, as I understand, a witness who is a defendant has viewed this place and pointed out certain things. In order for my client to understand and to see the things so that he can either disclaim or rebut the evidence presented against him, I want him in my presence to point out the things.

The COURT: Your point is that you want an opportunity with your client, to go there and examine it?

Mr. McDONNELL: Yes, your Honor.

The COURT: I am not sure but that can be arranged.

Mr. McDONNELL: I do not care whether it is done in the presence of the jury. In the Rocco case I know in the discretion of the judge he permitted them to go to the scene of the murder and point out certain things to their counsel.

The COURT: With the jury?

Mr. McDONNELL: With the jury.

The COURT: In the exercise of such discretion as lies within my power, I do not believe here it would be for the best interest of anyone to have the defendants go.

On the other hand, I will consider the question as to whether or not an opportunity will be given you, if after

going there you cannot understand the situation, to go there with your client alone, under proper supervision, provided, of course, that no comment is made by yourself in advance that any such thing would happen or any intimation given to the press. I will consider that and see what you decide after you go to the scene this morning.

Mr. McDonnell: That is all right. That is my only interest.

The Court: The motion that is filed here now is:

> "Now comes the defendant John A. Donnellon and moves that he be permitted to view the scene of the alleged crime."

You do not include in that "with the jury"?

Mr. McDonnell: That does not include "with the jury".

The Court: Your motion that your client be permitted to accompany the jury on the view and the exception that you took——

Mr. McDonnell: I did not take any exception, your Honor.

The Court: This simply applies to a view at some time?

Mr. McDonnell: Yes, your Honor.

The Court: I will take that up.

Mr. McDonnell: That is as your Honor views it, I believe.

The Court: This motion is simply a request that he be permitted to view the scene of the alleged crime with you?

Mr. McDonnell: Yes, your Honor.

The Court: It does not say "with counsel." You better add in there with—your name—with yourself, as counsel.

(Mr. Webber, in behalf of defendant Snyder, presented a written motion.)

(The motion presented by Mr. Webber was read by the Court.)

The Court: As I understand, Mr. Webber's request is directed to attending the view with the jury, but you, (Mr. McDonnell), want an opportunity to have your client go to the scene with you?

Mr. Webber: My request is particularly for my client, Snyder, to be there with the jury, to see what they see. I

take it that what the jury sees on a view is evidence and that is evidence against my client.

The COURT: If that is your motion, in such discretion as is within my power, that motion on the part of the defendant Snyder, to go with the jury on the view, is denied.

Mr. WEBBER: Defendant Snyder excepts.

The COURT: That exception is noted.

Exception No. 9.

I will delay any decision upon the motion of Mr. McDonnell until after he has been to the scene of the murder himself. That, as I understand, is satisfactory to Mr. McDonnell.

Are we ready for the view?

Mr. WEBBER: Yes, your Honor.

The COURT: Recess.

(At 10:53 a. m. the Court and jury retired for the purpose of a view.)

(The jury were taken to a view, alighting from the bus on Somerville Avenue, Somerville, in front of the filling station No. 202 of the Cities Service Refining Company, where the following occurred:)

The COURT: Now, Mr. Volpe, if you are ready.

Mr. VOLPE: Just first stand here, gentlemen, and take a look inside of the gasoline station. Now step in, please.

(The following occurred inside the filling station:)

Mr. VOLPE: Now, gentlemen, I call your attention to this glass here (indicating), this window (indicating the back window of the filling station,) about the position of the glass, and I ask you to look at that, and the relative position of the entrance, especially to the right or to the left, coming in through the door. And then this oil tank here on the right of this window; the other two windows on the right of the building, and I want you to take note of the size of the room, and this telephone here, and these two doors, one on each side of the telephone. Take note, also, of the location of this other gas tank over here, back of the door; this desk on the left. Also look out the window

at the back, and notice the gravel in the yard, and the fence there.

That's all in here.

Mr. WEBBER: I would like to call your attention to the view from the inside, looking out; the expanse of the glass in the door, and the opening in the floor, the condition of the floor.

The COURT: Anything here, Mr. McDonnell?

Mr. MCDONNELL: No, there isn't anything I desire to call attention to.

The COURT: Have you finished here, Mr. Webber?

Mr. WEBBER: Yes, your Honor.

Mr. VOLPE: And notice this partition in line with the door as you come in.

The COURT: All right.

(The jury were again taken to the outside of the building.)

Mr. VOLPE: I want you to take a view of the other side of the sidewalk from this location, and note the driveway on the right of the gas station, and on the left, and these two pumps, or three pumps, noticing the distance from the pumps on the entrance of the gas station.

Now, I would like to have you come over here and take a look at the gas station as it sits back there.

(The jury were taken across the street to the opposite sidewalk.)

Mr. VOLPE: I want you to get a look at the whole layout, the righthand entrance and the lefthand entrance over there, where that car is standing. Take particular notice of the width of this street, and, as you stand here, notice the bridge going towards Union Square, with the right and left driveways.

The COURT: Anything, Mr. Webber?

Mr. WEBBER: Yes, your Honor. I would like to have the jury notice the nature of the travel, and the nearness of the station to the street; also its width, and the opportunity of anybody passing by to look into the station and see what was taking place, if anything.

The COURT: Anything, Mr. McDonnell?

Mr. MCDONNELL: Nothing, your Honor.

Mr. VOLPE: That's all here, then. I want to take them up here a little ways, not very far.

The COURT: In the bus?

Mr. VOLPE: In the bus, yes.

(The jury returned to the bus, alighting at a location opposite No. 250 Somerville Avenue.)

Mr. VOLPE: Now, gentlemen, I ask you to look down that street over there. It is agreed that that is Allen Street. I am then going to take you down there to look at the next street. While you are here, I want you to notice the street up there where the lights appear.

Mr. WEBBER: It is agreed that that is Prospect Street, your Honor.

Mr. VOLPE: Yes, leading to Central Square.

The COURT: Anything here, Mr. Webber?

Mr. WEBBER: While we were at the gasoline station we didn't notice the lights, and I would like to call attention to some of them.

The COURT: Well, we can stop there on the way back.

Mr. WEBBER: The time was between seven and eight o'clock.

The COURT: We can check this when you go back. There is nothing here, Mr. Webber?

Mr. WEBBER: Nothing here.

Mr. VOLPE: I want to call attention to the street down there that runs parallel with Allen Street. That is Linden Street. Can I show that there is a street connecting those two?

Mr. WEBBER: If you say so, I will agree it is so.

Mr. VOLPE: That is a southbound street, connecting Allen Street with Linden Street, running parallel with this street we are on. So that (indicating) is Allen Street, and that (indicating) is Prospect Street up here, running at right angles to this street.

The COURT: Anything here, Mr. Webber?

Mr. WEBBER: No.

The COURT: Have you completed your view now?

Mr. VOLPE: Yes, your Honor.

The COURT: You say you would like to look at the lights down at the filling station?

Mr. WEBBER: Look at the lights.

The COURT: You want the jury to stop there?

Mr. WEBBER: The three of us can look it over, and then we can agree on it.

The COURT: You can have the jury stop there, if you want to.

Mr. WEBBER: If it won't be too much trouble.

Mr. VOLPE: You mean the lights in the gas station?

Mr. WEBBER: I mean outside.

The COURT: You can stop there, if you want to have the jury stop. We will have them do it.

Mr. WEBBER: I will go out first and look, and then, if I want something, I will tell your Honor.

The COURT: Yes. If you want us to get out and look, we will have them do so.

(The jury entered the bus and were taken to a point opposite the filling station, where the following occurred, not in the presence or hearing of the jury:)

Mr. VOLPE: That middle pump wasn't there at the time.

The COURT: It is agreed that the only pumps that were there were the two outside pumps, and that the middle, or blue one, was not there.

Mr. VOLPE: Yes, your Honor.

The COURT: I can state that to them.

(The jury left the bus and assembled on the sidewalk.)

The COURT: Now, it is agreed that at the time of the offense,—that is, on April 9, 1931,—there were but two pumps in front of the gasoline station, the one on the extreme right, that is painted green, and the one on the extreme left, that is painted black. Those two were there. The one in the middle, with the blue striping on it, was not there. It is also suggested that the jurors look at the street lights from that corner down there (indicating), and the situation of those lights and those down the street.

Mr. WEBBER: So far as the middle pump is concerned, we are accepting Mr. Volpe's statement. We have no knowledge, but if he says so, there is no doubt of that.

I ask that attention be called to the two lights at the right of the station, the street light down there, and those up there (indicating).

The COURT: There is one at the corner.

Mr. WEBBER: Yes.

The COURT: The light on the corner, and one on each side of the street, those two there, and that light over there (indicating), and the light above.

Mr. WEBBER: And the lowness of this fenec opposite the filling station, so far as it tends to obstruct the light.

The COURT: All right.

(The jury re-entered the bus and returned to the Court House.)

"Now, what have you before you on which to form your judgment and to render your finding and verdict? The view, the testimony given by the witnesses, and the exhibits, comprise the evidence in this case, comprise the evidence that is before you."

"As I say, it is for the jury to say, from all the evidence before you, taking into consideration what it is contended outside of the evidence that you have relative to the firing of any shot—the conduct of any of the parties just before and just after, and any appearances or any evidence that you may gather from the appearance of the locality itself, the testimony relative to the result of the shot, the course of it, and what was done. All that is a part of the surrounding evidence and the circumstances that you shall take into consideration. And then, having taken all the surrounding circumstances into consideration, it is for you to say from all the evidence before you, whether or not it was a withdrawal. If you find that an attempt was made to withdraw, whether or not it was a genuine withdrawal or whether it as a precipitous flight to escape detection, of course that contention cannot be considered if you find that Snyder was the one that actually fired the shot that killed Kiley.

"If you find that defendant Snyder did not fire the shot which killed the decedent, there is a material variance between the specifications and the proof, and the defendant cannot be convicted of murder in the first degree, with deliberately premeditated malice aforethought."

COMMONWEALTH OF MASSACHUSETTS,
Middlesex, ss:

SUPERIOR COURT.

In testimony that the foregoing pages are true copies of excerpts from the original transcript of the evidence, in the capital case of *Commonwealth* v. *Herman Snyder et al.*, I hereunder set my hand and affix the seal of the Superior Court for the County of Middlesex, this twenty-seventh day of July, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL.]

FREDERICK C. BEAN,
Assistant Clerk.

No. 241, October Term, 1933.

Re

HERMAN SNYDER, *Petitioner,*

vs.

COMMONWEALTH OF MASSACHUSETTS, *Respondent.*

APPENDIX 5 TO PETITION FOR CERTIORARI.

I, A. C. Webber, counsel appointed by the Superior Court of Middlesex County to defend the Petitioner Snyder, certify that the matter contained in the subjoined pages constitutes a true record of the procedure in relation to view by jury in the capital cases in Massachusetts therein referred to. The historical references, and italics added to the texts are mine.

The sources of my information are as follows:

Printed accounts of trials published by the Commonwealth of Massachusetts and in the office of the Attorney General of the Commonwealth.

Stenographic Transcripts of Evidence in murder trials in the office of the Clerk of the Supreme Court of Massachusetts.

Stenographic reports of trials in the files of the District Attorney for the Suffolk District.

Stenographic reports of murder trials in the files of the Social Law Library, Suffolk County Court House, Pemberton Square, Boston.

In the Sacco-Vanzetti case, the authoritative account of the trial published by Henry Holt & Co., New York, 1928.

A. C. WEBBER.

The Commonwealth of Massachusetts, the respondent in the above entitled case, does hereby agree that the foregoing may be added to the Record in the case, as Appendix 5 to the Petition.

JOSEPH E. WARNER,
Attorney General,
By GEO. B. LAURIE,
Asst. Atty. Gen.

List of Capital Cases.

Reference is made to citations where the case came before the Supreme Judicial Court.

1892, Commonwealth v. Lizzie Borden, Bristol, before Chief Justice Mason and Justices Blodgett and Dewey.

1894, Commonwealth v. Daniel M. Robertson (162 Mass. 90) Bristol, before Chief Justice Mason and Justices Dunbar and Sheldon.

1899, Commonwealth v. John O'Neil (169 Mass. 394) Franklin, before Chief Justice Mason and Justices Sheldon and Fessenden.

—— Commonwealth v. John McManus, Suffolk, before Mr. Justice Lilley.

1899, Commonwealth v. John H. Chance and Arthur Hagan (174 Mass. 245) Suffolk, before Justices Bishop and Stevens.

1901, Commonwealth v. Charles R. Eastman, Middlesex, before Justices Gaskell and Aiken.

1902, Commonwealth v. Joseph Wilfred Blondin, Suffolk, before Justices Braley and Stevens.

1904, Commonwealth v. Charles L. Tucker (189 Mass. 457) Middlesex, before Justices Sherman and Sheldon.

1904, Commonwealth v. Angles Snell (189 Mass. 12) Bristol, before Justices Aiken and Schofield.

1909, Commonwealth v. Napoleon J. Rivet (205 Mass. 404), Middlesex (Lowell), before Justices Harris and Hitchcock.

1909, Commonwealth v. Chester Jordan (207 Mass. 259) Middlesex, before Justice Stevens.

1909, Commonwealth v. Spiropulous and Mantir (208 Mass. 71) Middlesex, before Justices Fox and White.

1910, Commonwealth v. Elizabeth Richmond (207 Mass. 240) Middlesex, before Justices Crosby and Dana.

1910, Commonwealth v. Hattie La Blanc, Middlesex, before Mr. Justice Daniel W. Bond.

1910, Commonwealth v. Silas N. Phelps (209 Mass. 396) Franklin, before Mr. Justice Schofield.

1916, Commonwealth v. Oscar F. Russ (232 Mass. 58) Suffolk, before Mr. Justice Sisk.

1921, Commonwealth v. Sacco and Vanzetti (255 Mass.

369; 259 Mass. 128; 261 Mass. 12) Norfolk, before Mr. Justice Thayer.

1922, Commonwealth v. Dascalakis (243 Mass. 519; 246 Mass. 12) Suffolk, before Mr. Justice Keating.

1925, Commonwealth v. Celestino Madeiros (255 Mass. 304) Norfolk, before Mr. Justice Lummus.

1925, Commonwealth v. Devereaux, Heinlein and McLaughlin (256 Mass. 387; 256 Mass, 391) Middlesex, before Mr. Justice Fosdick.

1926, Commonwealth v. Jerry Gedzium (259 Mass. 453; 261 Mass. 299) Middlesex, before Mr. Justice Lourie.

1928, Commonwealth v. Frederick H. Knowlton, Jr. (265 Mass. 382) Middlesex, before Mr. Justice Gray.

1930, Commonwealth v. Cerro and Gallo (275 Mass. 320) Suffolk, before Mr. Justice W. A. Burns.

Lizzie Borden Trial.

During the trial the following took place, on the question of view (see pages 96-97 Stenographic Report):

"Mr. Knowlton (District Attorney, afterward Attorney General): At our own desire and also at the desire of the learned counsel for the defence, who are as anxious as we are that everything connected with this tragedy should be seen by the jury, I now move that the jury be directed to take the view of not only the interior, but exterior of the house, and of such other points as to which there will be testimony, as counsel may be able to agree that the jury shall see.

Mr. Robinson (former Governor): I would say on behalf of the defendant this has been a subject of conference, and we cheerfully join in it. We should have made the same request of the Court, if the government had not made it. *I would suggest that while, of course, the defendant is entitled to accompany the jury, she does not desire to go,* and does not really feel able to take this excursion this afternoon for that purpose, and we waive all her rights, (I say this in her presence and with her consent), to any participation in the view.

Mason, C. J.: *The Court in ordering the view desire it distinctly understood that if the defendant desires to be*

present at the view, she may be permitted to be present. She will not be required to be, if she does not desire to be.

Mr. ROBINSON. I have made her fully informed of the situation, and that is her wish.

(The officers were then sworn to accompany the jury upon the view. It was agreed that Mr. Moody (afterward Justice of the Supreme Court of the United States) on behalf of the Commonwealth, and Mr. Jennings on behalf of the defendant, should accompany the jury.)"

TRIAL OF DANIEL M. ROBERTSON

The following took place on the question of view:

"Mr. KNOWLTON (Attorney General): May it please the Court, both the counsel for the defense and for the Commonwealth think that while it is not indispensable, it would be to the advantage of the jurors to see the house in which the homicide was committed. Some of the furniture is probably differently arranged, but the house itself, and the arrangement of the rooms, and the yard, and the outer doors are substantially as they were at the time of the occurrences as to which evidence will be introduced. I am authorized to say that the counsel for the defense join in this request, and I think it would be for the advantage of the jurors and the speed of the trial. My learned associate thinks it would be a better time to take that view before the general opening of the case; that he could make his opening more intelligently and perhaps more briefly. We will take your Honor's judgment about that.

MASON, C. J. (after conferring with the other members of the Court): The Court sees no objection to taking a view at this time, if that is desired, and would like to ask the counsel for the defense if they desire that the prisoner should be present at the view.

Mr. BARNEY: No, we do not desire it. Counsel see no occasion for that. I do not know whether the prisoner should be consulted or not.

Mr. KNOWLTON: Whether it is not his right.

Mr. BARNEY: I suppose it is his right.

Mr. KNOWLTON: Better have it formally waived.

Mr. BARNEY (after consulting prisoner): I think not.. I do not understand the defendant's counsel are making any objection to this; the defendant does not."

(Pages 15 and 16 of the stenographic record.)

(The remarks of Chief Justice Mason are to be read in connection with his views later expressed in the trials of O'Neil and McManus following.)

JOHN O'NEIL TRIAL.

(See page 8 of Printed Report of Trial.)

"MASON, C. J.: If convenient arrangements can be made so that it will not be a hardship for the jury, the Court will be inclined to grant the view. I distinctly understand that it is not to be complicated with any request for the defendant to accompany the jury on the view."

JOHN MCMANUS TRIAL.

The following took place on the question of view:

"Mr. SCHOFIELD (afterward Justice of Superior Court and later U. S. District Court): In this case, may it please your Honors, after the opening, we would like to suggest, in fact make a motion to the Court, that the jury be permitted to take a view of these premises. I understand, the Attorney General has just informed me, he will make no objection to that motion, and I think it will assist in understanding the case. Some things about the locality there will undoubtedly be important as to the statements. The place is on Hudson Street, not far,—94 Hudson Street.

The ATTORNEY GENERAL: I don't know that I ever oppose a view in a criminal case, if your Honors please; I don't know. * * * Do I understand, Mr. Schofield, that you desire—it might make some difference to my opposition whether you desire—the defendant to go to this view or not?

Mr. SCHOFIELD: Well, *I suppose the defendant in a case of this kind has a right to go on the view, if there is one.*

MASON, C. J.: *Will it be asked?*

Mr. SCHOFIELD: *It will not be asked.*

MASON, C. J.: *It would have a bearing upon the discussion, of course, in ordering a view, as to what degree of inconvenience it would involve.*

Mr. SCHOFIELD: The request will not be made, I will inform the Court, that the defendant may exercise his right of accompanying the jury if a view is granted.

MASON, C. J.: What say?

Mr. SCHOFIELD: The request will not be made that the defendant may exercise his right to go with the jury. He will waive it, if a view is granted. * * *"

TRIAL OF CHANCE AND HAGAN.

"BISHOP, J.: The Court takes the view that the motion should be granted, the view not to include such parts of the streets as do not appear to be important, including the drug store and station and such other places as the Court says that it will be useful for the jury to see. *The Court is of the opinion that if a view is taken it is the right of the prisoners to be present at the view, unless they waive that right.* Do the prisoners desire to be present?

Mr. GEORGE R. SWASEY: The defendant, Hagan, your Honor, refuses to be present at any view ordered by the Court.

BISHOP, J.: How is it in regard to the defendant Chance?

Mr. HARRIMAN: If the defendant Hagan is not going, we will waive it in behalf of the defendant Chance." * * * * * * "Mr. SWASEY: I wish to further state, if your Honors please, that if the defendant Hagan is taken over the view by any officer of the Court it will be against his objection.

BISHOP, J.: *It is at his option.*

Mr. SWASEY: *I have stated that he refuses to go.*

BISHOP, J.: Yes.

Mr. SWASEY: And if taken over any portion of this territory or any place under the direction of the Court, it will be subject to his exception.

BISHOP, J.: He will not be. * * *"

* * * "Mr. KNOWLTON (Attorney General Hosea M. Knowlton): The Commonwealth has no objection.

BISHOP, J.: And no objection to the route?

Mr. KNOWLTON: No, sir. As I said before, we expect to offer no evidence that Mr. Hagan went over that route, or

connect him in any way with that route. We do expect to show that Chance took that route, and if Chance wants to see that route I do not see why he ought not to.

BISHOP, J.: The Court will retire and consider the matter more carefully."

* * * "The Court came in at 3.20 o'clock and Bishop, J. made the following announcement:

The Court has considered this matter and makes this decision: While the Court has the power to order a view and while it appears by the statements of counsel that a view in this case would principally affect the prisoner Chance, yet, *as we cannot say that it will not affect the defendant Hagan, the Court does not consider it expedient to order a view against his objection and refusal to be present at the view.* * * *"

TRIAL OF CHARLES R. EASTMAN.

(See page 46 of Stenographic report.)

"GASKILL, J.: The view may be taken and the Government may proceed to make such opening as it deems important to aid the jury in their view.

Mr. KNOWLTON (Atty. General): May I be pardoned in asking if my friends desire to have the defendant go on the view, or will they waive his rights, if he has any?

Mr. CHAS. W. BARTLETT: As far as the defendants attending the view we will waive that privilege and go without the defendant. I hardly see how he can aid us particularly.

GASKILL, J.: *If the defendant will formally waive his right to go he may do so now.*

The PRISONER: I waive that privilege."

JOSEPH WILFRED BLONDIN TRIAL.

After the opening for the Commonwealth the following occurred (See page 136 of stenographic record):

"BRALEY, J. (afterward Justice of the Supreme Judicial Court): We think that if the jury are to take a view, it is better that they should do so before the introduction of any evidence. The view may include Chelmsford as well as the location on Green Street in the City of Boston as well as

any other place in the City of Boston to which you desire to call the attention of the jury.

Does the defendant waive *his personal right* to accompany the jury?

Mr. MORRISON: He does, your Honor.

BRALEY, J.: *Then he must do so in open court and a record made of it.*

Mr. MORRISON: Yes, your Honor, I will see that he does so.

BRALEY, J.: *If you will see that he does so now.*

The PRISONER: Yes.

BRALEY, J.: You waive *your right* to accompany the jury on the view which has been asked for in your behalf by your counsel?

The PRISONER: Yes, sir."

* * * * * * *

Justice Braley "had a genius for the exacting requirements of a trial judge of the first order."

* * * * * * *

TRIAL OF CHARLES L. TUCKER.

"Mr. VAHEY: If your Honor please, it is agreed by the counsel for the Commonwealth and the counsel for the defendant that a view of the premises and the territory which are to be the subject of much testimony in the case, would be of very material assistance to the jury in understanding the evidence; and therefore, in behalf of the defendant, and with the consent of the counsel for the Commonwealth, I move that the jury take a view of such objects and places as may be pointed out by the counsel for the Commonwealth and counsel for the defendant, respectively, under the direction of the Court. I will have the defendant exercise his right, if he so desires.

The DEFENDANT: I request that the jury take a view of the place, and I do not desire to be present.

Mr. VAHEY: *The defendant waives his right to be present.*"

Note: There is no reference to the view in the charge, "You are to decide the case, gentlemen, upon the evidence

given in open court by the witnesses who testified before you" (See p. 1539).

TRIAL OF ANGLES SNELL.

The following took place before the Court on the question of view (see pages 66-7):

"AIKEN, J.: I think this is the proper time to bring up the subject of the view. Counsel on both sides have spoken to the court in an informal way and the district attorney in his opening assumed that a view would be taken, which he was justified in doing. I presume a view is desired?

Mr. DUBUQUE (Afterward Justice of the Superior Court): Yes, sir; it is desired by the defense.

Mr. PARKER (Attorney General): And by the Commonwealth.

AIKEN, J.: If a view is to be granted *it is important that the defendant should waive any right to be present at the view, and I will inquire of him if he so waives, or you may speak to him, Mr. Dubuque, if you have not done so. The could will not decide upon the matter until that matter is decided.* Snell, do you waive any rights to be present at the view the jury will take tomorrow?

The PRISONER: I would like, your Honor, very much, if it is my right, to go to the view with the others. *I waive my rights.*

AIKEN, J: *You waive your rights?*

The PRISONER: Yes, sir.

AIKEN, J.: Very well; *if you waive your rights the view will be granted* and Mr. Dubuque, the court makes this by way of suggestion, that if there is anything that you would like to call to the attention of the jury you may make a partial opening at this time and make a full opening later on. The limitations of the view might restrict you in what you might wish to say, and if so I will suggest to you that you may say it by way of partial opening at this time."

TRIAL OF NAPOLEON J. RIVET.

(See Transcript of Evidence, Vol. I, page 53, following conference between Court and Counsel for defendant at the bench).

"Mr. BENT: The clerk may make an entry on the record that the defendant waives his right to accompany the jury on the view.

The CLERK: Will he state so?

Mr. BENT: He cannot state so in English.

The CLERK: He can say enough to say yes or no.

(To Prisoner:) Rivet, the jury under the direction of the Court and at your request are about to take a view of the premises. *Do you waive your right to go with that jury to see the premises?*

The PRISONER: *I do.*"

TRIAL OF CHESTER JORDAN.

(At page 83 of Stenographic Record.)

"Upon a conference between Court and counsel, it was agreed that a view of the premises should be taken.

"STEVENS, J.: *Let the prisoner waive any right he may have to be present.*

Mr. CHARLES W. BARTLETT: Very good; I will speak to him about that. (After conference with associates) I suppose that had better be waived by him standing up and waiving it. Mr. Sullivan, you have him stand up.

STEVENS, J. (to Clerk): *Ask him if he waives his right to be present.*

The CLERK: Chester S. Jordan, it is arranged that a view of the premises in question shall be taken by the jury. Do you waive your right to attend—do you request that and waive your right to attend?

The PRISONER: I do.

STEVENS, J.: *Let a record of that be made by the stenographer.*"

TRIAL OF PETER DELOREY AND JAMES MANTIR.

(At page 81 of Stenographic Report.)

"FOX, J.: *Will the defendants waive their right to go on the view?*

Mr. WINSLOW: They will have to, I suppose.

FOX, J.: *Peter Delorey, do you waive the right to go on the view?*

Defendant DELOREY: *I do waive the right.*

FOX, J.: *James Mantir, do you waive the right to go on the view?*

Defendant MANTIR: I do."

TRIAL OF ELIZABETH RICHMOND.

The following occurred after the view had been taken (Page 707):

"CROSBY, J.: *The prisoner should have been allowed to proceed with the jury on the view if she had so desired.* By an omission—by an oversight, no mention was made of that fact. *Is that now waived by the prisoner?*

Mr. GLOAG: If your Honor please, I have consulted with her and she is willing to waive our not having been present.

CROSBY, J.: *I will ask the prisoner—do you waive the fact that you were not present with the jury when they took a view?*

The PRISONER: I do, yes."

TRIAL OF HATTIE LA BLANC.

In discussion on view no mention was made by either side of defendant's rights. Court on its own motion on p. 58 of stenographic report says:

"The COURT: *Now in some way the defendant should waive the right to go on the view.* I should not like to have her go, because it is not essential she should go.

Mr. JOHNSON: The defendant is ready to waive the view. I will have her do it personally, if your Honor desires.

The COURT: I guess you had better.

The CLERK: *Hattie La Blanc, do you waive the right to go upon the view in this trial?*

The PRISONER: *Yes.*

The COURT: "Now, Mr. Foreman and gentlemen, I want to say to you in reference to the view that you do not go out in this locality to look about for the sake of getting evidence in the case. All the evidence you get is introduced here at the trial. * * *

(Page 59) The theory of the view is this, that after you have seen it and seen the locality, it is thought that you will

be better able to understand the testimony which refers to the locality that you would if you hadn't seen it."

TRIAL OF SILAS N. PHELPS.

(Pages 70 and 71, Transcript of Evidence.)

"Mr. DAVENPORT: I wish to make a motion for a view (The defendant presented to the Court a motion for a view.) (Discussion at the Bench.)

The COURT: In regard to this motion, what does the District Attorney say?

IRWIN, D. A.: I do not desire to oppose the motion.

The COURT: Then I understand a view will take practically all the day.

IRWIN, D. A.: Yes, sir.

The prisoner waived his right to go on the view personally.

The COURT: * * * I think the oath administered to the jury is the best instruction. I shall grant the motion for a view. * * *"

TRIAL OF OSCAR F. RUSS.

(At pages 31-33 of Transcript.)

After statement by the District Attorney that both sides desire a view, and a motion for a view, following instructions to the jury in regard to the view follows:

(Page 33.)

"Mr. MURRAY: The defendant *waives the right* to accompany the jury on the view."

SACCO-VANZETTI TRIAL.

(References are to printed transcript of the record of the trial of the Sacco-Vanzetti Case, published by Henry Holt & Co., N. Y. (1928), in five volumes).

(Vol. I, Page 48.)

"The COURT: Will there be a motion at any time to take a view?

Mr. KATZMANN: Yes, your Honor, on the part of the Commonwealth.

The COURT: Now, will you see to it that a proper waiver is signed by both defendants? *As a general rule of law they are entitled to be present.* While the court has passed upon

it, yet I always prefer in the cases tried before me to have a waiver signed in person by the defendants.

Mr. J. McANARNEY: We will see that is done."

* * * * * * *

(Page 49.)

Mr. KATZMANN: The Commonwealth moves, if your Honor please, that the jury, accompanied by the officers and counsel designated by the Court, take a view of the scene of the crime and of such other places and vicinities as may to either side seem material and helpful to the jury. It is believed, on the part of the Commonwealth, that such a view will be of great and material assistance to the jury in understanding the evidence later to be introduced.

The COURT: Mr. McAnarney, what do you say?

Mr. J. McANARNEY: We are agreeable and would like the view, also.

The COURT: Mr. Moore?

Mr. MOORE: Yes, your Honor.

The COURT: *Have the defendants signed a waiver of being present at the time of the view?* I like that simply for the record of the case.

Mr. J. McANARNEY: *They have, if your Honor please,* and I leave the waiver with the clerk." (Handing waiver to the clerk.)

* * * * * * *

(Vol. II, Page 1816.)

Mr. J. McANARNEY: If your Honor, please, we are ready to take that view.

The COURT: *Have the defendants waived formally in writing as I suggested they should?*

Mr. J. McANARNEY: Yes, they have, if your Honor, please. (Handing paper to Court.)

The COURT: *Let it be filed. You just put your initials on there,* Mr. McKenney. (The stenographer initials the paper.)

The COURT: Do you desire to be heard, Mr. Katzmann, upon a motion to take a view of the Boda automobile, so called?

Mr. KATZMANN: No, your Honor.

The COURT: This will be admitted simply,—the view will be taken the same as in the case of the Buick automobile, so that the jury may use the view for the purpose of giving application to the evidence they have heard upon the witness stand. Are you ready to go on the view now?

Mr. J. McANARNEY: Yes, if your Honor please. (View of Boda Overland car is then taken.)

The COURT: You may go, gentlemen. Let the officers come forward, please. Pay attention once more, please, to the oath. (The oath is administered to the officers by the Clerk.)

The COURT: Do you think it desirable that the Court should go with you?

Mr. J. McANARNEY: Pardon?

The COURT: Do you think it desirable that the Court should go with you in taking the view?

Mr. J. McANARNEY: We would like very much to have your Honor do so.

The COURT: I will do that."

* * * * * * *

(Vol. III, Page 3155.)

Mr. J. McANARNEY: If your Honor, please, we are ready to take that view.

The COURT: *Have the defendants waived formally in writing as I suggested they should?*

Mr. J. McANARNEY: Yes, they have, if your Honor please. (Handing paper to Court.)

The COURT: *Let it be filed. You just put your initials on there,* Mr. McKinney. (The stenographer initials the paper.)

The COURT: Do you desire to be heard, Mr. Katzmann, upon a motion to take a view of the Boda automobile, so called?

MR. KATZMANN: No, your Honor.

The COURT: This will be admitted simply—the view will be taken the same as in the case of the Buick automobile, *so that the jury may use the view for the purpose of giving application to the evidence that they have heard upon the witness stand.* Are you ready to go on the view now?

Mr. J. McANARNEY: Yes, if your Honor please. (View of Boda Overland car was then taken.)"

DASCALAKIS TRIAL.

See pages 17-18 of this brief for waiver of Counsel at the trial, and testimony given at the hearing on the motion for new trial.

TRIAL OF CELESTINO MADEIROS

The following entry appears on the docket of the case in the Superior Court:

May 12, 1925. Commonwealth moves that view be taken. *Defendant by counsel acquiesces* and *personally waives his right* to accompany jury on view. Motion for view granted and view taken.

TRIAL OF DEVEREAUX, HEINLEIN AND MCLAUGHLIN.

(Known as Carbarn Case.)

"DISTRICT ATTORNEY: (Page 42) Mr. Reading * * * I now formally move that the jury take a view of the premises.

THE COURT: I take it that there is no opposition to the motion.

Mr. HIGGINS: (Counsel for Devereaux) I have no objection.

THE COURT: It is allowed. I understand Mr. Sheriff that the defendants wish to go with the jury on the view. Now, can you make arrangements for them? They do not have to go in the same cars with the jurors.

Mr. TIERNEY: *The defendant, Bennett, your Honor, waives the right to go.*

Mr. GOLDMAN: *If you Honor, please, the defendant King waives the right to go.*

The COURT: *Then I take it the defendants, Heinlein, Devereaux, and McLaughlin wish to go with the jury on the view?*

Mr. HOAR (for defendant McLaughlin): They so state to their counsel, your Honor."

TRIAL OF JERRY GEDZIUM.

(At Pages 22-32.)

"The COURT: All right. Now, Mr. Weeks, does the defendant waive *his right* to go on the view?

Mr. WEEKS: The defendant waives *his right,* your Honor.

Mr. READING (District Attorney): *I would suggest that counsel not having the right to do it for him, that the defendant do it himself.*

The COURT: *Mr. Gedzium, do you desire to make a statement?*

The DEFENDANT: *I waive the right,* your Honor, to go on the view.

The COURT: Very well."

TRIAL OF FREDERICK H. KNOWLTON, JR.

(At Page 16 of Transcript.)

"The COURT: A view having been asked for and allowed by the Court, it will now be taken. The defendant, I understand, waives *his right* to be present at the view.

Mr. DRISCOLL: Yes, your Honor.

The COURT: *Perhaps you had better have him do it himself.*

(The defendant waives his right to be present at the view.)"

TRIAL OF CERO & GALLO.

(At page 13 of Transcript.)

"Mr. SHEENAN (Assistant District Attorney): I might make this suggestion to your Honor. When we take a view—they are highly technical in some of these murder cases usually, the defendant himself—they just follow the custom and the *defendant himself waives, rather than counsel, his right to go on the view.* I do not know whether you want both defendants to waive this or not.

Mr. GARO (Counsel for Gallo): Why not wait until we come to that.

The COURT: That is a matter to come up after the jury is impanelled, and if a view is to be taken * * * "

(At page 49 of Transcript.)

The COURT: *I understand that the defendants waive their rights to accompany the jury on the view.*

Mr. GARO: Yes.

Mr. BICKFORD: Yes. * * *

The COURT: * * * *Do I understand both defendants waive their right to accompany the jury on the view?*

Mr. GARO: *Gallo does.*

Mr. BICKFORD: *Cero does.*"

(4081)